

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

17-P-1598

COMMONWEALTH

VS.

GEORGE CORREA.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, George Correa, appeals from orders denying his motions to return personal property and for reconsideration. We affirm.

On October 22, 2013, after a trial by jury, the defendant was convicted of breaking and entering in the nighttime with the intent to commit a felony, and larceny from a building. Thereafter, following a jury-waived trial, the defendant was found to be a habitual offender.<sup>1</sup> The defendant's direct appeal

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<sup>1</sup> During the sentencing hearing, the Commonwealth informed the trial judge that the defendant has a very lengthy record of convictions and parole violations extending back more than thirty years, in addition to the offenses that are the subject of this case. The Commonwealth's estimate of the total value of the jewelry stolen in this case was in excess of \$650,000. At oral argument before us, counsel for the defendant acknowledged that the value of the jewelry and other property stolen by the defendant was over \$500,000. In accordance with the terms of G. L. c. 279, § 25, the trial judge sentenced the defendant to a

was stayed to permit him to file a motion for a new trial. Such a motion was filed and then denied by the trial judge on May 12, 2015. The direct appeal and the order denying the motion for a new trial were consolidated. On March 24, 2016, another panel of this court affirmed the defendant's convictions and the order denying his motion for a new trial in an unpublished decision under our rule 1:28. See Commonwealth v. Correa, 89 Mass. App. Ct. 1114 (2016).

Meanwhile, the first motion for the return of personal property was filed by the defendant pro se on August 12, 2014. The motion sought the return of \$1,083, which the defendant described as "non-contraband property" that was seized by the Newton Police Department during the booking process. The defendant also included his affidavit in which he maintained that the funds in question were unrelated to the matters for which he was arrested and that he had in his possession at the time of his arrest a bank statement containing information relevant to the money he was seeking to have returned. There is no indication in the record before us that the Commonwealth was served with this motion or that it was acted on in the Superior Court. The defendant acting pro se filed the same motion for the return of personal property again on September 25, 2014. On

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term of twenty years to be served from and after the sentence he was then serving.

May 19, 2016, two and one-half years following his convictions, the defendant, acting through counsel, filed a third motion for the return of personal property. This motion sought the return of \$1,083, which the defendant alleged had been seized from the his wallet at the time of his arrest, and jewelry seized by the police pursuant to a search warrant and introduced in evidence by defendant's own counsel at trial even though it had no connection to the crimes. Thereafter, the defendant filed a motion requesting rulings on his second and third motions for the return of property, and the Commonwealth filed an opposition.

On September 19, 2016, the same judge who presided over the trial denied the defendant's third motion for the return of property.<sup>2</sup> Thereafter, the defendant filed a motion for reconsideration, which was denied by the same judge on November 29, 2017. This appeal followed.

The defendant's argument that he is entitled to the return of certain jewelry that his own counsel offered in evidence at trial and that witnesses testified belonged to members of the defendant's family is easily disposed of because the defendant

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<sup>2</sup> The judge entered an order as follows: "Upon review of the [parties'] written submissions, this motion is denied as untimely filed insofar as it was filed more than one (1) year after the deadline set in [Rule 61 of the Rules of the Superior Court (1980) and Mass. R. Crim. P. 11 (a) (2), as appearing in 442 Mass. 1509 (2004)]."

has not asserted that the property in question belongs to him. Rule 61 of the Rules of the Superior Court (1980) provides that "[m]otions for the return of property and motions to suppress evidence shall be in writing, shall specifically set forth the facts upon which the motions are based, shall be verified by affidavit, and shall otherwise comply with the requirements of Mass. R. Crim. P. 13. Such motions shall be filed within seven days after the date set for the filing of the pre-trial conference report pursuant to Mass. R. Crim. P. 11 (a) (2), or at such other time as the court may allow." Implicit in this rule is the requirement that the property that is the subject of the motion belong to the defendant.

With regard to the \$1,083 that was seized from the defendant at the time of his arrest, we discern no abuse of discretion. While a judge has discretion to entertain a rule 61 motion beyond the seven days following the filing of the pretrial conference report, a judge is not obliged to reach the merits of a rule 61 motion that is not filed until well after the defendant has been convicted, and in circumstances in which the defendant has offered no explanation for the delay. Moreover, even if the defendant's motion was filed in a timely manner, the judge who heard the evidence at trial and saw the witnesses testify was not obliged to accept the barebones assertions in the defendant's affidavit. See Commonwealth v.

Rzepphiewski, 431 Mass. 48, 55 (2000) ("A judge is not required to accept as true the allegations in a defendant's affidavit, even if nothing in the record directly disputes them"); Commonwealth v. Pingaro, 44 Mass. App. Ct. 41, 48 (1997) ("The credibility, weight, and impact of the affidavits in support of the motion are entirely within the judge's discretion. He is not required to believe them even if they are undisputed").

The orders denying the defendant's third motion to return personal property and his subsequent motion for reconsideration are affirmed.

So ordered.

By the Court (Agnes, Blake & Neyman, JJ.<sup>3</sup>),

  
Clerk

Entered: August 15, 2019.

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<sup>3</sup> The panelists are listed in order of seniority.